Wynn Las Vegas, LLC *and* Ronda Larson. Case 28–CA–022818

July 3, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On December 14, 2010, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, limited cross-exceptions and a supporting brief, and the Respondent filed an answering brief to the limited cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision, and to adopt the recommended Order as modified and set forth in full below.[3]

The judge dismissed the allegation that the Respondent violated Section 8(a)(1) of the Act by questioning employee David Sackin about his involvement in a proceeding before the Nevada State Labor Commissioner. For the reasons explained below, we reverse the judge's dismissal and find that the Respondent violated Section 8(a)(1) by questioning Sackin.

I. RELEVANT FACTS

The Respondent operates a casino in Las Vegas. Since opening the casino in 2005, the Respondent has employed Sackin as a table games dealer.

When the casino opened, the Respondent established a tipping policy pursuant to which all dealers who worked at a table during a 24-hour period pooled and shared customer tips. In 2006, the Respondent created a new position, Casino Service Team Lead (CSTL), essentially replacing its floor supervisors. Although floor supervisors had not been included in the dealers' tipping pools, the Respondent announced on August 21, 2006, that CSTLs would henceforth be included. As the Respondent's dealers earn minimum wage and rely on tips as a significant part of their compensation, this new policy caused considerable consternation among the dealers. Some time after the new policy was announced, the Transportation Workers Union launched an organizing drive among the table games dealers, and the employees selected the Union as their collective-bargaining representative.

Employee Sackin had been an open and active union supporter during the unionization drive. After the Board certified the Union in May 2007, Sackin became one of two day-shift union stewards.

In late 2007, several dealers filed claims with the Nevada State Labor Commissioner regarding the Respondent's changed tip pooling policy. The Labor Commissioner consolidated those claims and eventually conducted a hearing on the matter in 2009; the dates of the hear-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by suspending employee David Sackin, we note that the judge relied on the following facts: (1) several of the Respondent's 11 articulated reasons for suspending Sackin were demonstrably false; (2) at least one reason was "makeweight"; (3) other reasons—as well as the events of August 11, 2009, in their entirety—were greatly exaggerated; (4) the Respondent failed to investigate at least one of the reasons; and (5) the Respondent skipped progressive steps of its disciplinary procedure in suspending Sackin. These facts demonstrate that the Respondent's stated reasons for disciplining Sackin were pretextual. Given this finding of pretext, we find it unnecessary to pass on the judge's additional finding that Sackin's behavior did not threaten the safety, security, or integrity of the casino, or on the judge's finding regarding the Respondent's "stitch[ing] . . . together" of security footage.

In adopting the judge's finding that the Respondent's discharge of employee Ronda Larson violated Sec. 8(a)(1) of the Act, we agree with his finding that the timing of the discharge and the Respondent's deviations from its usual disciplinary practices evinced animus toward Larson's protected activity. We further agree with the judge that, contrary to the Respondent's assertion, Larson was neither insubordinate to her Casino Service Team Leader (CSTL) nor rude to the Respondent's guests. We find that these circumstances demonstrate that the Respondent's asserted reasons for discharging Larson were pretextual. In view of our finding of pretext, we find it unnecessary to pass on the following: (1) the judge's characterization of the Respondent's refusal to allow Sackin to assist Larson in composing a written statement as a violation of Larson's *Weingarten* rights; (2) his finding that CSTLs cannot give dealers directions, and that therefore a dealer cannot be insubordinate to a CSTL; and (3) his finding that an earlier, first written warning given to Larson, for self correcting her dealing mistakes, deviated from the Respondent's usual disciplinary practices.

In view of our adoption of the findings that both Sackin's suspension and Larson's discharge violated Sec. 8(a)(1) of the Act, we find it unnecessary to pass on the judge's additional findings that the suspension and discharge also violated Sec. 8(a)(3), as such findings would not materially affect the remedy.

[2] We have amended the judge's conclusions of law consistent with our findings herein.

[3] We shall modify the judge's recommended Order to conform to our findings and the Board's standard remedial language and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

We shall also substitute a new notice to conform to the Order as modified.

ing were July 7–9, August 18–20, and October 5–8, 2009.[4]

Before the hearing commenced, Sackin agreed to testify on behalf of the dealers who had filed the claims with the Labor Commissioner. The Respondent learned that Sackin planned to testify when it received a witness list, dated July 1, 2009, naming Sackin. The witness list also summarized his anticipated testimony.

On August 10,[5] Sackin was at work when he was "tapped off" his gaming table and summoned to the office of Assistant Casino Manager for Administration Peggy Collura.[6] Collura and her immediate supervisors administered disciplinary policies within the table games department.[7] Tyrone Lancaster, Collura's counterpart at another casino owned by the Respondent, was present when Sackin arrived, and he stayed for the duration of the meeting. Sackin sat in a chair facing Collura; Lancaster stood behind him, out of Sackin's line of sight. Apprehensive about being called into the office, Sackin immediately asked Collura whether he needed a *Weingarten* representative.[8] Collura assured him that the meeting was unrelated to discipline and, in turn, asked Sackin if he had a lawyer; Sackin said no. Collura then asked if he knew he was on the witness list for the Labor Commissioner's hearing concerning the tip policy change, and he answered that he did. After explaining that she was talking to potential witnesses to help the Respondent prepare for the hearing, Collura asked Sackin what he planned to say at the hearing. Sackin evaded the question, stating that he had not had time to think about it. Collura then asked if Sackin had ever received a tip—he said that he had—and if he had ever seen a CSTL receive a tip—he said he did not think so. Pressed on the last answer, Sackin said he had seen non-dealers receive tips, but only rarely. Collura then asked Sackin if he had signed any forms agreeing to be involved in the litigation before the Labor Commissioner, but Sackin evaded that question, as well, to avoid bringing "any more questioning upon" himself. The meeting, which had lasted about 10 minutes, then ended. Contrary to her statement to Sackin, Collura did not meet with any other dealers on the witness list.

Ronda Larson had also worked as a table games dealer at the casino since it opened in 2005. Like Sackin, she was active in the union organizing drive and became a union steward after the employees selected union representation. Larson was also visibly active in opposing the Respondent's tip policy change. Like Sackin, Larson agreed to testify for the employees and was on their witness list provided to the Respondent. Larson testified on August 18; she also assisted the employees' attorneys at the hearing. The Respondent suspended Sackin on August 21, allegedly for violating a series of employer policies that day. In mid-September, the Respondent terminated Larson, ostensibly for rudeness to customers and insubordinate behavior afterwards.[9]

II. THE JUDGE'S DECISION

The judge found that Collura's questioning of Sackin about his anticipated testimony before the Labor Commissioner did not violate Section 8(a)(1). The judge reasoned that "[a]s a matter of comity," Collura was not required to provide Sackin with the safeguards described in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965) (setting forth safeguards subject to which an employer may question an employee on matters involving Section 7 rights in preparation for Board proceedings). The judge did not, however, address the Acting General Counsel's contention that, apart from *Johnnie's Poultry,* the questioning was coercive under the generally applicable totality-of-the-circumstances test. As explained below, we agree with the Acting General Counsel that the questioning was coercive as so alleged.[10]

III. DISCUSSION

An employer's coercive questioning of an employee about employees' protected concerted activity violates Section 8(a)(1) of the Act. See, e.g., *United Services Automobile Assn.*, 340 NLRB 784, 785–786 (2003), enfd. 387 F.3d 908 (D.C. Cir. 2004). Accordingly, in response to the Acting General Counsel's exceptions, we must determine (1) whether the Respondent's questioning of Sackin concerned protected, concerted activity, either his own or that of other employees, and, if so, (2)

[4] Of the dealers named in the consolidated claim, one was a former dealer and three were current dealers.

[5] In his decision, the judge stated that this incident took place on July 13. This inadvertent error does not affect our decision.

[6] Collura testified that she called the meeting at the behest of the Respondent's lawyers, who instructed her to contact the dealers on the list in order to inquire into their anticipated testimony.

[7] At all relevant times, Collura reported to William Westbrook, the director of casino administration (as well as vice president of operations), who in turn reported to Charlie Ward, the vice president of table games. We note that the judge referred to Collura as assistant administration manager and Westbrook solely as vice president of operations. These inadvertent errors do not affect our decision.

[8] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (employee entitled to union representative at investigatory interview that employee reasonably believes may result in disciplinary action).

[9] The judge found that the Respondent violated Sec. 8(a)(1) by suspending Sackin and terminating Larson, and we adopt those findings. See fn. 1, supra.

[10] In light of our finding, we find it unnecessary to pass on the judge's finding that the *Johnnie's Poultry* safeguards are inapplicable in the context of a non-Board legal proceeding.

whether the questioning was coercive. We answer both questions in the affirmative.

There can be no question but that the actions of employees coming together to protest the new tipping policy and then presenting their case to the state Labor Commissioner were concerted. Nor can there be any reasonable doubt that the employees were engaged in protected activity. Their claim was effectively about their wages, arguably *the* central term and condition of employment. See *Parexel Int'l, LLC*, 356 NLRB 516, 519 (2011), and cases cited. It is legally irrelevant that the employees, after failing to get satisfaction from their employer, pressed that claim before a state administrative officer. It is well settled that such actions, when taken to advance employment-related goals, constitute protected activity. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978) ("the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums"). Further, an employee's testimony in the course of administrative proceedings in support of fellow employees constitutes protected concerted activity. See, e.g., *Pete O'Dell & Sons Steel*, 277 NLRB 1358, 1358–1359 (1985), enfd. mem. 803 F.2d 1181 (4th Cir. 1986) (testimony protected where union filed wage complaint with Army Corps of Engineers and employee testified during Corps investigation).[11]

Turning to the issue of coercion, the Board's general test is "whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with" Section 7 rights. *Rossmore House*, 269 NLRB 1176, 1177 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Among the factors that may be considered are the background of the questioning, the position of the questioner within the employer's hierarchy, the place and method of questioning, the nature of the information sought, and the truthfulness of the employee's reply. See *Holiday Inn-JFK Airport*, 348 NLRB 1, 4 (2006). Other factors include whether the employer gives assurances against reprisal or provides a reason for questioning the employee. See id. See generally *Bourne Co. v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) (setting forth relevant factors for determining if questioning is coercive).

Applying these considerations to the Respondent's questioning of Sackin, we have no doubt that the interrogation was coercive and would reasonably tend to interfere with employees' Section 7 rights. Sackin was summoned to the meeting by being "tapped off" from his table assignment in the midst of his shift. The questioning was conducted by Collura, a relatively high ranking manager in the Respondent's hierarchy, in her office. During the questioning, another of the Respondent's managers, someone Sackin did not know, stood behind Sackin; Sackin, who was seated, was aware of his presence but unable to see him.

The manner of the questioning that followed, as well as Sackin's reaction to both the meeting and the questioning, also support a finding of coercion. Indeed, Sackin sensed upon entering the room that he was about to be disciplined. Although Collura gave him assurances to the contrary, Sackin remained apprehensive. Sackin was not informed that his participation in the interview was voluntary. The questioning was formal and did not resemble the casual give and take of a conversation. Finally, after informing him of her intent, Collura expressly questioned Sackin about his anticipated testimony and about his own personal involvement in the litigation. In the circumstances, such a direct inquiry into the substance and extent of Sackin's protected activity would reasonably tend to interfere with his Section 7 rights and those of other employees, who were counting on him to advance their cause. See *Pete O'Dell & Sons Steel*, supra at 1359, 1367 (against background of Army Corps of Engineers' investigation into employer's alleged violations of Davis-Bacon Act, employer coercively interrogated employee scheduled to testify by asking what employee planned to tell the Corps). The fact that Sackin answered evasively, attempting to avoid giving Collura any information about his testimony or his involvement in the litigation, supports the finding that the interview was coercive.[12]

Because Collura's questioning concerned employees' protected, concerted activity and was coercive in nature,

[11] Collura's questioning also concerned Sackin's agreement to testify on behalf of the dealers. Such an agreement was "preparing for" protected activity (actually testifying), and therefore was itself protected concerted activity. See *Meyers Industries, (Meyers II)*, 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[12] *Evergreen America Corp.*, 348 NLRB 178, 208 (2006); *Town & Country Supermarkets*, 340 NLRB 1410, 1424 (2004); *Westwood Healthcare Center*, 330 NLRB 935, 941 (2000).

The Respondent's reliance on *Guess?, Inc.*, 339 NLRB 432 (2003), involving questioning of an employee at a deposition, is misplaced. The Respondent cites that case for the proposition that employer questioning of an employee about Sec. 7 activity is not unlawful if the questioning is relevant, if it does not have an illegal object, and if the employer's interest in the information outweighs the employee's confidentiality interests under Sec. 7. See id. at 432–435. Here, however, the questioning did not occur at a deposition or during the course of any other formal (on the record) proceeding, and—given that Sackin's anticipated testimony was summarized on the witness list—the Respondent has not shown *any* need for the information, let alone one that outweighed the Sec. 7 interests that are implicated. See id. at 435 fn. 8.

we find that the Respondent thereby coercively interrogated Sackin in violation of Section 8(a)(1) of the Act.[13]

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Transportation Workers Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On or about August 10, 2009, the Respondent violated Section 8(a)(1) of the Act by interrogating employee David Sackin concerning his protected concerted activities.

4. On or about August 21, 2009, the Respondent violated Section 8(a)(1) of the Act by suspending employee David Sackin because he engaged in protected concerted activity.

5. On or about September 6, 2009, the Respondent violated Section 8(a)(1) by suspending employee Ronda Larson and thereafter discharging her because she engaged in protected concerted activity.

6. The above unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The Respondent, Wynn Las Vegas, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their protected concerted activities.

(b) Discharging, suspending, or otherwise discriminating against employees for engaging in protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Ronda Larson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make David Sackin and Ronda Larson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Ronda Larson and the unlawful suspension of David Sackin, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharge and suspension will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Las Vegas, Nevada casino copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are note altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 10, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[13] Although we would find that Sackin's discipline and Larson's discharge violated Sec. 8(a)(1) regardless of Sackin's interrogation, we note that the interrogation supplies additional evidence of the Respondent's animus toward Sackin's and Larson's protected concerted activities.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Mara-Louise Anzalone and *Pablo Godoy*, for the General Counsel.
Gregory J. Kamer and *Bryan J. Cohen (Kamer Zucker Abbott)*, of Las Vegas, Nevada, for the Respondent.
Ronda Larson, appearing pro se, of Las Vegas, Nevada.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on May 11, 12, 13, 14, and June 7, 2010, pursuant to a complaint and notice of hearing issued on February 26, 2010, by the Regional Director for Region 28. The complaint is based upon an unfair labor practice charge filed on December 15, 2009,[1] by Ronda Larson, an Individual, which she amended on February 26, 2010. The complaint alleges that Wynn Las Vegas, LLC (Wynn or Respondent) has committed certain violations of Section 8(a)(1) and Section 8(a)(3) of the National Labor Relations Act. Respondent denies the allegations. All parties have filed post-hearing briefs and they have been carefully considered.

The principal issue is whether Respondent disciplined two union stewards in violation of Section 8(a)(3) and (1) of the Act. Respondent concedes that it fired day shift steward Ronda Larson and suspended alternate day shift steward David Sackin, but asserts it did so for good cause. The complaint also alleges that Respondent has interfered with, restrained and coerced its employees in the exercise of their Section 7 rights by coercively interrogating employees about their concerted activities, including denying them union representation during interviews and disciplinary meetings. Respondent asserts that it did not deny employees union representation in those circumstances for they were not entitled to representation under the *Weingarten* rule[2] in the meetings which the complaint addresses. In addition it asserts that the questioning was not coercive as defined in the Act.

Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

I. FINDINGS OF FACT

A. Jurisdiction

Respondent admits it has been at all material times a Nevada limited liability company operating in Las Vegas where it operates a hotel and casino. During the 12-month period ending December 12, 2009, Respondent, in conducting its business, derived gross revenues in excess of $500,000 and purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Nevada. Accordingly, it admits and I find it is, and has been at all material times, an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

B. Background

On April 28, 2005, Respondent began operating a high-end casino and hotel located on the Strip in Las Vegas, Nevada, known as "The Wynn." Respondent's President is Andrew Pascal. Reporting to Pascal are William Westbrook, Vice President of Operations, and Charlie Ward, Vice President of Table Games. Reporting to Westbrook is Assistant Administration Manager, Peggy Collura, and Tyrone Lancaster who at all material times was employed as Respondent's Assistant Casino Administration Manager[3] at the Encore.[4] Additionally, Anthony Tyne is employed as the Casino Manager, and Rick Sorani is the Assistant Casino Manager.

Upon opening the Wynn, the casino employed table games dealers,[5] floor supervisors, pit managers, and shift managers. Dealers are responsible for dealing their games while maintaining the transparency and integrity of the game. Moreover, dealers are expected to socialize with customers and to answer questions, while avoiding potentially sensitive topics such as politics and religion. Dealers are expected to explain the game to new players, including basic strategy[6] and are expected to act as diplomats between players to keep the game friendly. Until September 2006, floor supervisors directly supervised several dealers during their shifts and completed performance evaluations for the dealers. Pit managers supervised the floor supervisors and a shift manager floated around the casino supervising all activities on the casino floor.

It is a common industry practice for patrons to tip dealers. Before opening, the Wynn established a tip or "toke"[7] policy, whereby dealers were required to pool all tips received at individual tables during a 24-hour period with all the other dealers who worked during that same 24-hour period. Indeed, table games dealers earn only minimum wage, thus most of their remuneration comes from the toke pool, not the hourly wage. Accordingly, dealers have never been allowed to retain individual tips, but instead have always been required to drop all tips into the "toke box"[8] attached to the side of each table. This practice is true for tokes handed to the dealer and to winning bets placed by players intended as tokes for the dealer. At the end of the shift, all tokes are pooled and distributed to the dealers. As described below, on September 1, 2006, Respondent expanded the tip pool first by redefining the duties of the floor supervisor and then recasting that job as nonsupervisory. Simultaneously, it renamed that position as "Casino Service Team Lead" or "CSTL." This meant that the pool of eligible recipi-

[1] All dates are 2009 unless stated otherwise.
[2] *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).
[3] He has since changed positions and now works at the Wynn as an assistant casino manager of operations.
[4] The Encore is the Wynn's sister hotel and casino, which opened in December 2008. The two buildings share a ground floor and there is some overlap in terms of management duties. As noted below, the Wynn has been organized by the Transportation Workers Union (the TWU); the Encore remains nonunion.
[5] Table Games Dealers deal the games of blackjack, craps, roulette, baccarat, casino war, and other casino table games.
[6] With regard to blackjack, "basic strategy" refers to playing the game by a widely recognized set of statistical rules. Tables of players often get upset with a player for refusing to play basic strategy because they believe it will upset the odds and cost money for everyone at the table.
[7] Tips are commonly referred to as "tokes" in the casino industry.
[8] A "toke box" is a metal box that hangs on the edge of the dealer's side of the table.

ents was significantly expanded and the pool payouts significantly reduced for each employee.

As part of its business, Respondent maintains an extensive network of over 1000 digital surveillance cameras throughout the casino that capture 99 percent of what occurs in the casino. Many of the cameras have the ability to pan, tilt and zoom. Cameras are stationed above table games, and throughout the casino to maintain security and to ensure that the games are being played fairly. The video does not include any audio, but does capture body language and some expressions, depending on the angle of the camera. Respondent also maintains behavior rules for its employees who are required to behave consistently in most respects. These rules are enforced to some degree by progressive discipline principles, though Respondent has reserved the right to deviate.

C. The New Tipping Policy, Connected Litigation and Union Representation

On August 21, 2006, Respondent announced a new tip pooling policy, which became effective on September 1, 2006. As noted, it created the new position of CSTL which essentially replaced the position of floor supervisor. Previously, floor supervisors and managers had been prohibited from accepting tips, but under the new policy CSTLs were placed into the toke pool, a practice which allowed them to supplement their base pay. Casino Managers and Assistant Casino Managers continue to be prohibited from accepting tips and from sharing in the pool. The duties of the newly created CSTL[9] were similar to those of a floor supervisor, but refocused them on customer service. Under the new tip pooling policy CSTLs, box dealers,[10] and table games dealers were all required to share the pooled tips which had previously been reserved solely for table games dealers.

The change resulted in both public and private litigation. In September 2006, some Wynn dealers anonymously filed complaints with the Nevada State Labor Commissioner. That agency dismissed the complaints asserting that the evidence was insufficient to warrant any action. Then, in January 2007, several dealers filed what appears to have been a class action in state court. The complaint was eventually dismissed by the Nevada Supreme Court on three grounds: (1) the Labor Commissioner has exclusive jurisdiction over wage matters and the statute does not afford private litigants the right to enforce the state wage laws; (2) declaratory relief is not available where an adequate statutory ground exists; and (3) as the plaintiffs are at-will employees, there is no contract of employment, implied or otherwise, which can be enforced. See, *Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96 (Nev. 2008).

During the course of that litigation, Respondent's table games dealers and the Transportation Workers Union (TWU) began to work toward union representation utilizing the procedures under the NLRA. On March 30, 2007, the TWU sent a letter to Respondent announcing that 46 employees, including Charging Party Larson and fellow alleged discriminatee Sackin, were to serve as in-house union organizers. The TWU filed its representation petition on April 9, 2007. Five weeks later, on May 13, 2007, the TWU won the election and the Board's Regional Director issued a certification of representative to the TWU on May 23, 2007. Collective bargaining began in August 2007; a tentative agreement was finally reached on November 17, 2009. It remains unsigned, but partially implemented due to circumstances not litigated here, said to be related either to the length of the contract term or because many employees are unhappy with the TWU's acceptance of the toke policy.

In September 2007, former Wynn table games dealer Megan Smith filed a wage claim with the Labor Commissioner. Thereafter, several other employees were able to intervene; the Commissioner, however, aware of the *Baldonado* case, took no action and awaited its outcome. After the court's dismissal of the appeal, the Commissioner consolidated the Smith wage claims with some additional employee complaints and conducted a hearing which lasted 10 days between July and October 2009.

On July 1, following the Commissioner's internal litigation rules, the claimants provided Respondent with a list of witnesses. Present on the list were the TWU's two day-shift stewards, Larson and Sackin. Their appearance on the list seems to have triggered the instant matter. Beyond that, Larson had previously been visible to Respondent's management as she had been outspoken and had taken a leadership role in the toke pool litigation.

D. Larson and Sackin's Protected Conduct Preceding Turnover of the Witness List

In September 2006, Respondent's president, Andrew Pascal, conducted a meeting of the table games dealers to explain the need for the toke policy change. During that meeting Larson stood up and verbally opposed the policy saying, among other things, that it would have a negative affect on the dealers' attitude toward working at the Wynn. She thought the change was unfair as it diluted the tip pool money and that it sent the message to the staff that they were not very important. A statement such as this at a meeting is clearly protected Section 7 conduct. See also, *Colders Furniture*, 292 NLRB 941 (1989), enfd. 907 F.2d 765 (7th Cir. 1990); *Bergensons Property Services*, 338 NLRB 883, 886 (2003) (employee complaints at a group meeting are protected conduct); *CSK Tool & Engineering*, 332 NLRB 1578 (2000); *Dickens, Inc*., 352 NLRB 667, 672 (2008).

In that same time frame, as it became clear that legal counsel was required, Larson became involved in collecting money from fellow employees in order to retain and pay the attorneys. Using the employee break room she openly and visibly collected about $20,000 for the cause. This activity, too, was protected as it was aimed to support Section 7 protected litigation. See *Altex Ready Mixed Concrete*, 223 NLRB 696 (1976), enfd. 542 F.2d 295 (5th Cir. 1976), cited with approval by the Supreme Court in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). The many cases to that general effect include *Mojave Electric Cooperative*, 327 NLRB 13 (1998), enfd. sub nom. *Mohave Elec.*

[9] Respondent disputes that CSTLs are supervisors within the meaning of the Act.

[10] Box dealers are found at the roulette and craps tables. Although the box dealers' duties are not described in the record, it is fair to say that the box dealer is the casino worker who controls the "box" or betting layout. He is the one who accepts the bets, collects the losings, and pays the winners.

Co-op., 206 F.3d 1183 (D.C. Cir. 2000), *Nu Dawn Homes*, 289 NLRB 554, 558 (1988), and *Riverboat Services of Indiana*, 345 NLRB 1286 (2005).

And, as noted, the TWU had announced both Larson and Sackin as two of its in-house organizers. In addition, sometime in mid-2007, both Larson and Sackin became the day shift union stewards. Larson took the larger role and frequently served as a *Weingarten*[11] representative of bargaining unit employees who were being investigated for misconduct. That role is protected by Section 7 as well.

Similarly, but somewhat less visible, Sackin was active as a TWU organizer and on at least one occasion served picket duty for the Union during the negotiation process, making a television appearance in the process. Less active than Larson, he nevertheless served as the Union's conduit to the employees, provided news and was a source of information to them as questions came to him. Although he was less active, his Section 7 activity in support of the Union is clear.

There can be no question that both Larson and Sackin were known to take advantage of their Section 7 protection. Moreover, as stewards, their leadership skills and roles were well understood by management.

E. Collura Questions Sackin

David Sackin has 13 years experience as a dealer and has worked for Respondent since it opened in 2005. Principally a roulette dealer, he serves as one of the day shift union stewards. His name appeared on the July 1 witness list which the Labor Commissioner required be submitted to Respondent.

On July 13, assistant casino administration manager Peggy Collura, claiming she was directed by company attorneys to do so, began calling employees listed as witnesses to her office for an interview. The first was Sackin and he turned out to be the only employee she interviewed. She had supposedly been instructed by company counsel to "reach out" to the listed dealers to find out if they knew they were possible witnesses and to find out what they would say in their testimony. Collura's meeting with Sackin took place in her office in the presence of Tyrone Lancaster, her counterpart at the Encore. Sackin says he was led to believe that Lancaster, whom he did not know, was a company attorney. In fact, Lancaster stood behind the seated Sackin taking notes and Sackin could never really look at him.

Sackin had been "tapped off" his table and had no idea why he was being summoned and harbored some trepidation about the interview. Sackin asked if he needed a *Weingarten* representative but Collura assured him that he did not. Collura asked if he was aware that he was on the list of potential witnesses, which he affirmed. Collura then asked if he was represented by counsel for the Labor Commissioner hearing. Sackin replied that he was not. Collura asked if Sackin was aware that he might be called as a witness and asked what he would testify to if he was called. Sackin evaded the question and told Collura he had not had an opportunity to think the matter over and that he had not decided whether to testify or not.

Collura then asked Sackin if he had ever received a tip in his capacity as a dealer. Sackin affirmed that he had. Her next question was whether Sackin had ever witnessed a CSTL receive a tip from a patron. Sackin stated that he had never seen a CSTL receive a tip. Collura testified that she questioned further on this point, "I think I asked how many years he dealt and I think he said fifteen. I said, 'You've never had a customer say, oh, hey put a dollar—what's your number—to a CSTL and put a dollar on their favorite number?'" Sackin replied that he had seen a guest tip someone other than a dealer a couple of times. Next, Collura asked Sackin if he had signed any forms agreeing to be involved in litigation against Respondent. Again, Sackin evaded the question. Sackin testified that he withheld information in the interview because, "I didn't want to bring any more questioning upon myself." Collura testified that the meeting lasted approximately 10 minutes.

Although Collura testified that she intended to meet with other employees listed on the witness list, she never did. As a result, union steward Sackin was the only employee interviewed about his involvement in the Labor Commissioner hearing. That fact now seems most illuminating, given what followed.

F. Respondent's Discipline Program

Respondent utilizes what it describes as a progressive discipline system to address employee shortcomings. If a dealer makes small errors, such as accidentally paying a losing bet, the employee will receive a note to their file. These small errors are usually caught by the surveillance department which sends a report to Collura. The report is scanned into the employee's file, for recordkeeping purposes, but no disciplinary action is taken against the employee unless that type of error persists. Once a dealer receives two to three of these warnings, the employee then arrives at the next discipline step, a verbal acknowledgement. Both the dealer and the manager sign off on the acknowledgement and it is scanned into the employee's electronic file. Even so, Respondent does not consider this to be part of the progressive disciplinary system since these first two steps do not go into the dealer's human resources department file, but are instead maintained in the table games department employee files. Collura explained:

> So, a dealer could get just a straight out verbal. If it was a thousand dollar error, you know, rather than give them a note to file, we might go right to a verbal. Okay? The next step would be obviously a first written, which is for a violation; just depending on you know, what the violation is. The next step after that is a second written, and that's considered a second, last and final. That's to make them aware of you know, this is your last step. The next time you, you know, make an error in this manner, then it can be suspension and possible termination.
>
> . . . .
>
> . . . anytime we process a first written, a second written, a suspension, that is done electronically through our PeopleSoft, which is where you see all the information you have and then

[11] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), established that a union-represented employee who reasonably believes that an interview might lead to discipline has the right to ask for representation by the union.

that is electronically processed and is in HR's file, in their system, as well as our system. [For clarity, paragraphs have been placed in reverse order of her testimony.]

This so-called progressive disciplinary system effectively allows management the subjective authority to skip any of the steps if it deems the transgressions to be extremely serious. Thus, the steps shown in the table games department files are not part of the discipline system unless the error costs a large loss to the house. The first written and the second written are more often directed to behavior rule violations. And, as will be seen, the application of the discipline is frequently uneven.[12] Not only are disciplinary levels sometimes ignored, but those same levels are also sometimes skipped based on someone's subjective view of the triviality or the severity of the violation.

Once a violation is reported to the casino manager, the information is reviewed and an investigation of the situation is initiated. Collura reviews the preliminary information and decides with Westbrook and Ward whether a suspension is warranted. If a suspension is warranted, the employee is placed on suspension and management has the opportunity to conduct a more thorough investigation. Upon the investigation's completion, the employee is provided a "due process" meeting, during which he/she may add evidence or statements that may affect management's conclusions.

G. The Sackin Incident of August 21

On Friday, August 21, 11 days after his meeting with Collura and Lancaster, Sackin was running late to work. He had been delayed due to a traffic stop and the friend he was driving with wanted to shop at the nearby mall. She dropped him on Las Vegas Boulevard across from the Hotel's front entrance. This put him on the wrong side of the facility to timely reach the employee entrance. He knew he could just make it to his pit if he went through the front entrance and hurried down the hallway to the casino. He also knew he would not be able to use the time clock in the break room near the employee entrance and would have to make a handwritten correction which could be supported by the table's computer, known as Table Touch.

As he rushed through the casino, he was straightening his uniform which was not fully in place as he came through the door, though by the time he arrived at his pit he was properly attired. He also placed a newspaper he was carrying behind an ATM machine (later retrieved and disposed of). His hasty path to his workstation is compiled on a video disc which is in evidence.

Respondent had become aware of his lateness due to a cell phone call made by the Encore's casino manager Justin Sprague who had observed Sackin crossing a pedestrian bridge over Las Vegas Boulevard as he rushed toward the Wynn. The call alerted the scheduling manager that Sackin would be late. When the manager called the pit to alert it that Sackin would be late, he was surprised to learn Sackin had already arrived. This led Collura to investigate what had happened as she suspected Sackin must have used the front entrance. She advised operations vice president Bill Westbrook who ordered up the surveillance records for his review.

A review of the surveillance resulted in the conclusion that Sackin had violated eleven rules including: (1) failure to notify a Casino Manager of his late arrival; (2) entry through an unauthorized entrance; (3) not in complete dress uniform in the casino area; (4) running in a guest area; (5) leaving personal

[12] The General Counsel's factual recitation in its brief on this issue is instructive on the point. I quote it at length:

> . . . Respondent suspended a male dealer for "hockey-checking" a female dealer after interviewing the two parties involved and two other witnesses who were on the scene. The male dealer was given a five-day suspension and a Second, Last & Final Written Warning. Dealer Thomas Canonico made racist remarks to and about fellow employees, openly discussed the possibilities of the President Obama being assassinated, and was provided the full progressive disciplinary treatment until he resigned. Another dealer, Ella Choy was openly disrespectful toward a casino *manager* and merely received "counseling" for this infraction. Dealer Carlos De Leon openly questioned his Team Lead twice in front of guests and received his second "First Written Warning." Dealer Miguel Peralta "failed to follow the instructions given to him by a Pit Manager" and was only "counseled." Subsequently arriving to work and being suspected of being under the influence netted him but a Second Written Warning.
>
> Respondent has repeatedly exercised a great deal of discretion in meting out punishments. Less than a year following a previous infraction in which her actions were written up as "inappropriate and unprofessional," dealer Mary-Noel Whitcomb was cited for "disrespectful and inappropriate conduct toward fellow employees." Respondent took statements from numerous team members, and determined that "Mary *consistently* demonstrates a poor attitude toward her CSTLs when they are working in her section. Mary's behavior . . . is very uncomfortable for her fellow team members including dealers and CSTLs. . . . [T]he department will not tolerate Mary talking bad or criticizing any fellow team member regarding performance . . . in front of our guests." (emphasis added.) For this, Whitcomb was given a *second-within-a-year* "Second, Last & Final" Written Warning.
>
> Respondent testified that when a guest complains about an employee, the situation is taken very seriously, and more serious discipline is considered justifiable. Yet, table games dealer Hue Kim asked a guest for an emergency loan, *offering to pay it back with a $5000 casino chip that he would slip the guest during a game*. Not surprisingly, this elicited a guest complaint, yet Kim received merely a three-day suspension pending investigation and a Second Written Warning for these infractions. Dealer Dean McClusky was given only a written warning when he was a total no-call/no-show, and was only terminated after he came to work under the influence and was determined to have been endangering company assets and potentially alienating customers.
>
> Similarly, dealer Hong Sun received multiple "Second, Last & Final" Written Warnings within a short space of time, involving separate incidents that resulted in guest complaints. In the most blatant of these Ms. Sun accused a guest of smelling and asked him to change seats on her game. When the guest inquired as to what type of smell, Ms. Sun said "body odor, like you haven't showered." Ms. Sun then fanned the air several times in front of her face, further emphasizing an odor. This request totally embarrassed and humiliated the guest. Ms. Sun then in a further exchange with the guest regarding a game rule, asked the guest, "Can't you read?" and told the guest, "I know what I'm doing." Less than a month later, a customer submitted a comment card, reporting "Ms. Sun's unprofessionalism and overall poor attitude towards the guest." Even so, Respondent continued to employ Sun up through late April 2010, when she left the country unannounced.

property on the floor in the casino area (the newspaper was described as a "package"); (6) crossing through gaming areas instead of using the main aisles; (7) entering the pit from the side, not at the end; (8) pushing a coworker; (9) not clocking in; (10) failure to sign the "Clock In/Out Problem Log;" and (11) failing to maintain current contact information with Human Resources and the table games department. Some of these "violations" are clearly overkill, particularly the contention that Sackin had pushed a coworker and Collura's testimony that Sackin was "half-undressed."[13] Indeed, much of the description of the various violations is on the florid side, clearly an effort to characterize Sackin's conduct as worse than it was.

Two and a half hours after the incident, Collura and Lancaster (brought over from the Encore) called Sackin in for a meeting. Collura asked Sackin where he had parked and Sackin explained that his friend dropped him off because they were running late after a traffic ticket on the way to work. Sackin completed an employee statement and was informed that he was being suspended pending the results of the investigation of the incident. Collura told Sackin they would contact him on Monday after management had determined what had occurred and what discipline, if any, they were going to impose. Sackin informed Collura that his cell phone number had changed. Collura made a note of the change and Sackin left the casino. Collura neglected to advise her secretary of the new number and no one reached him on Monday. On Tuesday, he called and was asked to come right away to a "due process" meeting where he could explain what had transpired. He had been to the dentist and was uncomfortable, but came in anyway, asking for a *Weingarten* representative. A representative was not available and the entire meeting was postponed until Wednesday, August 26.

On Wednesday, August 26, Sackin returned to the Wynn for the due process meeting. Larson served as his *Weingarten* representative. After being asked if there was any further information he could provide regarding the incident, Sackin wrote an addendum to his statement. Westbrook stated he would review all of the information and determine the appropriate discipline. After reviewing the information, Respondent determined that Sackin violated 11 casino policies. Respondent returned Sackin to work with a suspension, time served without compensation, and issued Sackin a second, last and final warning.[14] Westbrook and Collura asserted that the discipline was appropriate due to the number of infractions.

Although Respondent has a policy against employees entering through the front door, Westbrook admitted that, on occasion, employees do use the front entrance and if they are caught, it generally results in a discussion or counseling memorandum. Moreover, tardiness generally results in minimal discipline. Each time an employee is late, s/he garners only a half of a single disciplinary point.[15] Respondent's accumulation of the infractions to obtain the level of discipline for suspension seems anomalous, given the fact that Sackin was trying to do the right thing, get to work on time. Indeed, not only is the employee pushing incident an inaccurate description, the failure to sign the clock-in problem log and the changed telephone number all seem to be make-weight. Even the charge that he had failed to report his lateness to the casino manager is wrong; he wasn't late. The push description is objectively wrong (and the employee was never even interviewed), the log correction might well have been made at an appropriate break, but calling Sackin to the meeting and then sending him home prevented the correction, and the telephone change was known to the person in charge, Collura, who should have passed the new number on to the appropriate people. In any event the delay harmed only Sackin, not the Company, for Sackin still needed to be scheduled for his return. Certainly Respondent does not claim that it was relying on a specific return date.

H. Ronda Larson's Termination

Ronda Larson is a table games dealer with 23 years experience. Though hired by Respondent when it opened in 2005, Larson had previously worked as a dealer for at least one other Steve Wynn casino, the Bellagio. She had also spent 12 years as a floor supervisor at Wynn's Treasure Island.

As mentioned above, she opposed the 2006 change in the toke policy and helped fund the legal expenses by her fellow employees, raising $20,000 for the attorneys. Larson and five other dealers spread the word that they were collecting $100 donations from each of the dealers in order to pay for legal representation. Larson held three "fund raising drives" in order to collect the money and did so in the dealers' break room where supervisors were present.

And, of course, she was heavily involved in the 2009 Labor Commissioner's hearing even though she was not a named plaintiff. Larson was present for each day of the hearing and assisted counsel by collecting notes from other dealers. During the hearing, Larson sat both with and behind counsel and took notes as well as passing notes to the attorneys. In this regard, both she and union president Connie Castro were seen to be working together in that endeavor. She attended each day of the hearing.

On July 13, 4 days after the first session of the Labor Commissioner hearing ended on July 9, Larson received a written warning for self-correcting three mistakes on a game called War. According to Collura, she should have called her mistakes to the attention of the CSTL. She explained:

> Well, it's to protect the integrity of the game. Dealers are going to make mistakes. They're out there dealing hundreds and hundreds of hands a day. So, if Ronda did make an error, which is very similar to an error on blackjack, giving a card, an extra card, to a player, all she needed to do is alert the CSTL. If the CSTL is there present, they're accountable for it. It puts back the cards on the table for surveillance to view

[13] What was Collura's purpose to provide such a description? Why not simply say Sackin was putting on his uniform jacket or tying his tie as he came through the casino? The video shows what happened.

[14] This was not the second written warning in Sackin's file. Rather, Respondent here skipped steps to reach the second level of the disciplinary process due to the supposed severity and number of the infractions.

[15] Respondent maintains a policy whereby employees receive "points" for being tardy and for absences. It is an eight point system and a half point would be minimal discipline.

> to say, hey, this was a mistake, this is not collusion, this is not anything else involved, and then we'd go ahead and—the CSTL instructs her to go ahead and take the money up and lock it back in the bank. It would have been, you know, end of story.

Due to the mistake, Respondent issued Larson a First Written. It did so despite the fact that the player knew she had made the mistakes and had acquiesced in the corrections. This discipline is not part of the complaint, though it did weaken her tenure and was taken into consideration later when Respondent decided to discharge her. Beyond that, the warning is not consistent with the small dealer error practice described by Collura, a warning kept in the table games department, rather than sending the matter up to management and on to human resources.

On September 6, the Sunday of Labor Day weekend, Larson was dealing blackjack at tables in the swimming pool area. The pool area is outdoors with some overhead covering and is utilized during the summer months to coincide with warm temperatures. It is a very casual area, a bit louder than inside and the alcohol consumption is said to be somewhat greater. Respondent sets a very relaxed attitude at the tables in the pool area; there is even a topless artificial beach nearby. Larson began her duties at 11 a.m. She was on a rotation ("string") with Romilda Sarant and Abegaille Sell in the pool pit. Sell was acting as the relief. Each dealer works for an hour and then has a half hour break. The dealers alternate so that Sell takes over the table for the dealer who is on break. She, in turn, also receives a half hour break.

Later that day, Larson was accused of two episodes of misconduct at her blackjack table. She was entirely unaware of either one since neither seemed to be remarkable or in any way memorable. Indeed, Respondent has presented video (without sound) of both incidents. The video is helpful only to the extent that it supports Larson's contention that nothing occurred which was out of the ordinary or which might be regarded as eventful. It does show how mechanical, rote and habitual a blackjack dealer's movements are. Respondent called witnesses to describe what led to its decision to discharge Larson.

The first incident involved a group of birthday party celebrants including individuals named Naishat Mehta and Andrew Salute. They never made any complaints at the time of the so-called incident, but were overheard by the pool manager griping somewhat later. The second concerns an almost wordless conversation between Larson and the CSTL for the pit, Derek Corsaro. She had suggested that her table needed a "fill" of red chips ($5 chips); he did not agree and her response was regarded as defiant and insubordinate. I suspect that the second incident would have been ignored if it had not been for the perceived customer complaint involving the Mehta party. Certainly Corsaro had very little to complain about. Furthermore, the Mehta incident seems to have been trivial and within the bounds of approved company behavior. Would these have been of concern had Larson not been a union steward who had recently received a First Written?

There are two factors here which are most curious and which tend to support a finding that at some stage Respondent had begun hunting for a reason to fire Larson. The first is the manner in which the managers sought out Mehta and Salute to encourage them to file written complaints, coupled with their too willing acceptance of the customers' reluctant comments. In fact, Mehta told them he did not want to fill out a comment card, doing so only after casino manager Anthony Tyne tracked him to his dinner reservation and pushed him into it. Standing alone, that seems to be extraordinary. When he testified, Mehta, who works as a manager for a software company in Santa Monica, said in retrospect he did not believe what he had perceived Larson to have done amounted to a firing offense. Even at the time it was happening, he regarded the Casino's urgency with suspicion, specifically Respondent's offer of free desserts, later negotiated to free nightclub passes in exchange for guest comment cards regarding Larson's conduct.

The second is what would appear to be a deliberate effort to prevent Larson from having full access to her *Weingarten* representative, Sackin, as she was ordered to provide a written statement about the two events. In that regard, she was summoned to Tyne's office toward the end of the day where she met with Tyne and assistant manager Rick Sorani. Sackin was brought in as the *Weingarten* representative. They asked her to provide a written statement concerning what had happened between her and Corsaro. She was then sent to a cubicle down the hall to write it. When Sackin attempted to accompany her and assist, Sorani barred him from doing so, even though the company generally allows *Weingarten* representatives the opportunity to do so. As a result, Larson wrote her statement without the benefit of discussing it with her steward. Later, Sackin was permitted to review the statement before Larson turned it in. However, he had been unable to discuss the incident with Larson in advance and had been barred from discussing the events as she was composing her statement. Part way through he was allowed to be with her, but only silently under Sorani's watchful and foreboding eye. Afterwards, Larson was suspended pending investigation of the complaints.[16]

The following day, Tyne called in the other two dealers on the string, Sarant and Sell, to give written statements about what had occurred between Larson and the Mehta party. Nei-

[16] [Witness SACKIN] In the end, [union president] Connie [Castro] was told that I could be in the meeting. It was the end of her break. She returned to the table, I was allowed to go in there, but I was told I could not speak at all, that there would have to be either Anthony or Rick there as a witness also.

So I went into this. [Larson is] three-quarters of the way done with her statement. Rick's there, I'm there, and she's there. When she was finished with the statement, Ronda and I told Rick that we didn't feel that was right. That was the first time that there's never been anybody allowed to speak to someone before or help in the process.

Q. [BY MS. ANZALONE]: What was his response to that?

A. He said, listen, we don't want anybody writing anybody else's statement.

Q. Okay.

A. At that time, I told him there was no way for me to write the statement, I wasn't there. I just wanted to aid her if she needed any spelling, some calming down, just to be there beside her and comforting.

Q. What was his response?

A. He said we're not going to allow anybody to help another especially if it could endanger the writing of the statement.

ther was able to describe what Larson had supposedly done. They could barely recall that the customers seemed to be grumbling, much less what it was all about. Sell had passed the matter off as inconsequential.

On September 9, 2009, Larson met with Westbrook and Collura for a due process meeting and again, Sackin was present as the employee representative. Larson submitted additional statements and ultimately Westbrook determined that Larson should be terminated based on the incidents and her prior disciplinary record. Larson was informed on September 17, 2009, that she was terminated.

II. ANALYSIS AND CONCLUSIONS

A. Questioning Sackin

The General Counsel's theories, that Collura's questions to Sackin regarding whether he knew he had been named as a witness in the Labor Commissioner hearing, whether he had counsel, whether he had observed CSTLs receiving tips and what he might be testifying about are all based upon application of the Board's *Johnnie's Poultry*[17] rule. That case is designed to protect witnesses before the NLRB who are being questioned by a respondent who has a legitimate purpose in doing so. Specifically, the safeguards are that the employer must: communicate to the employee the purpose of the questioning, must assure the employee that no reprisal will take place, and must obtain the employee's participation on a voluntary basis. The questioning must also occur in a context free from employer hostility to union organization and must itself not be coercive in nature. Moreover, the questions must not exceed the necessities of the legitimate purpose by prying into other union (or protected) matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, it loses the benefits of the privilege. A failure to provide the safeguards results in an 8(a)(1) violation.

The obvious difference is that the General Counsel here is not seeking to protect an NLRB witness being called to testify in an NLRB hearing. Sackin had been listed as a witness in a state labor commissioner hearing. This raises the immediate question of whether *Johnnie's Poultry* has any application whatsoever. After all, the state labor commission has its own concerns and rules about the protection of its witnesses. Indeed, while Section 7 rights are its primary focus, the NLRB has no primary interest in the rights of witnesses as they appear in other forums, even if Section 7 might be seen as applicable.

The issue of administrative comity was seen relatively early in the Board's decisions. It was first hinted in *Imperial Garden Growers*, 91 NLRB 1034, 1037 (1950) (overruled on a different issue, *Bodine Produce Co*., 147 NLRB 832 (1964)) where the Board observed that its authority over agricultural workers after 1947 differed from that of the Labor Department. It decided to accept the Labor Department's definition saying: "We believe it to be our duty to follow, whenever possible, the interpretation of Section 3(f) adopted by the Labor Department and its Wage and Hour Division, as that agency, and not this Board, has the responsibility and the experience of administering the Fair Labor Standards Act."

Seven years later, this deference became a matter of comity in another Fair Labor Standards matter. See *Olaa Sugar Company,* 118 NLRB 1442, 1444 (1957), when the Board said: "Moreover, considerations of comity between two agencies of the Government make it desirable that the view of the agency most often concerned with a problem be respected by the agency to which the problem is relatively incidental. [fn. omitted] This is particularly true where Congress has singled out the law creating the 'primary' agency as the guide to the other."

And, of course, the Board has often given comity to state labor relations agencies concerning unit placement questions so long as the decisions are not "clearly repugnant" to the policies of the NLRA, e.g., *Stand-By One Associates*, 274 NLRB 952, 953 (1985). See also *St. Joseph's Hospital*, 221 NLRB 1253 (1975), enfd. 542 F.2d 495 (8th Cir. 1976), where the Board said, "Contrary to the Administrative Law Judge, it is not a touchstone of comity that the procedures and policies of a state agency be identical to those of the Board. All that is required is that the state proceedings violate neither due process nor the specific mandates of the Act."

Therefore, the fact that a state, rather than federal, agency is involved is not of great concern.

The Nevada Labor Commissioner in large part stands in the shoes of the Department of Labor for analytical purposes. As *Olaa Sugar* says, the DOL (Commissioner here) is the agency most concerned with witnesses who appear before it. It is also the agency most often concerned with state wage laws. Indeed, it is the agency where the employees chose to litigate the toke pool issue, asserting that the Wynn had breached state wage laws when it changed the make-up of the pool to include individuals who had previously been regarded as supervisory. Therefore, I have no difficulty in concluding that it is the state agency which has primacy when dealing with protecting the witnesses who come before it. The Board should provide comity to the Nevada State Labor Commissioner in the same manner as it provides comity to the Department of Labor in matters primary to it. Certainly insofar as witness rights are concerned, the Board's interest in the Labor Commissioner's witnesses, in the words of *Olaa Sugar*, is "relatively incidental."

As a matter of comity, I find it is inappropriate of the Board to apply its witness protection rules to witnesses appearing before other government agencies such as the Nevada State Labor Commissioner.

Moreover, if the Labor Commissioner's rules provide for some sort of informal discovery, as suggested by its directive to turn over witnesses names to the Wynn, an employer's exercise of that discovery right would not be coercive, but would instead be privileged under state law. Even *Johnnies' Poultry* recognizes that certain types of inquiries touching on factual matters to be developed at hearing are proper. Normally, of course, that would be handled by counsel, though here it was by an assistant administrator. In fact, Collura seemed to be operating

[17] *Johnnie's Poultry Co.,* 146 NLRB 770 (1964).

under instructions or oversight from counsel.[18] That difference seems to be of little importance here, as again, it is a matter for the Labor Commissioner, not the NLRB.

Accordingly, I find that the allegations set forth in paragraphs 5(a) and (b) should be dismissed.

As for paragraphs 5(c), (d), and (e), all of which allege that Sackin was denied a *Weingarten* representative at this August 10 meeting, they should be dismissed as well. Sackin was not called to the meeting for any disciplinary purpose. He was not accused of wrongdoing and Collura accurately advised him that was so. Once the meeting was established as having nothing to do with discipline, *Weingarten* had no application.

B. Disciplining Sackin

The General Counsel asserts that Sackin's discipline was in violation of Sections 8(a)(1) and (3) and must therefore present a prima facie case under *Wright Line*. As the Board enunciated in *Wright Line*:[19]

> [W]e shall henceforth employ the following causation test in all cases alleging violation of 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The General Counsel has the burden of establishing the existence of protected activity, knowledge of that activity by the employer, and union animus. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). In addition to establishing the listed elements, the General Counsel must show that the "timing of the alleged reprisals was proximate to the protected activities and that there was antiunion animus to 'link the factors of timing and knowledge to the improper motivation.'" *United Federation of Teachers Welfare Fund*, 322 NLRB 385, 392 (1996) citing *Hall Construction v. NLRB*, 941 F.2d 684 (8th Cir. 1991); *Service Employees International Local 434-B*, 316 NLRB 1059 (1995).

In determining whether the conduct in question is unlawfully motivated, the Board relies on both circumstantial and direct evidence. *Fluor Daniel, Inc*., 311 NLRB 498 (1993). "Since motive is critical to a finding of an 8(a)(3) violation, but since direct evidence of motive is rare, one must look to all of the attendant circumstances to determine whether Respondent acted improperly or not." *Keller Mfg. Co.*, 237 NLRB 712 (1978), enfd. in part, enf. den. in part without opinion, 622 F.2d 592 (7th Cir. 1980). See also, *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966), and *Atlantic Metal Products, Inc*., 161 NLRB 919, 922 (1966). Moreover, where the employer's reason for termination "given is implausible, then that fact tends to prove an attempt to disguise the true, and unlawful, motive." *Keller Mfg. Co*., supra, citing *Capitol Records*, 232 NLRB 228 (1977). See also *J. S. Troup Elec.*, 344 NLRB 1009 (2005) (Board will infer an unlawful motive if the employer's action is "baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive").

Once the General Counsel meets its burden of establishing the prima facie case, Respondent under *Wright Line* can rebut it by showing that prohibited motivations did not play a part in the employment decision. If the employer cannot rebut the prima facia case, the burden shifts to the employer to "demonstrate that the same action would have taken place in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089. The employer's burden is a burden of evidence and a burden of persuasion. *Hunter Douglas*, 277 NLRB 1179 (1985), enfd. 804 F.2d 808 (3d Cir. 1986), cert. denied 481 U.S. 1069 (1987). If the Respondent cannot present sufficient evidence, the employer will not have met its burden and a violation will be found. *R.E.C. Corp*., 296 NLRB 1293 (1989).

As described above, Sackin actively participated in the Union and was identified as an in-house union organizer. In addition to his steward responsibilities, Sackin was named as a potential witness at the Labor Commissioner hearing. Collura questioned him about his testimony and recognized during that meeting that he was someone the other dealers would "come to" if they had questions. As such, it seems evident that Respondent knew that Sackin was continuously participating in protected activity in his position as a union steward and in-house organizer.

Eleven days after being questioned about his testimony, Sackin had the misfortune of running late to work (due to a traffic ticket) and was subsequently informed that he had broken eleven rules. While Respondent contends that the General Counsel cannot establish a prima facie case based on the timing of the events, the temporal proximity of Sackin's participation to the Labor Commissioner hearings and his discipline is suspect. Moreover, Sackin's protected activity was ongoing. In assessing the other surrounding circumstances regarding timing, it seems that the General Counsel has met the burden of showing proximity between protected activity and the resulting discipline.

Whether or not union animus or its equivalent in protected concerted activity cases was a motivating factor in the decision to terminate Sackin is also in dispute. Even though Respondent has provided evidence that Respondent and the Union have nearly agreed upon a first collective-bargaining agreement, one which has been partially implemented, that fact does not preclude a finding of union animus vis à vis a specific employee.

While Respondent contends it would have terminated Sackin whether or not he was engaged in protected activity, I find that the degree of punishment in this case was not supported by the underlying facts and instead the discharge was due to its ani-

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[18] To the extent that the General Counsel argues that Sackin was coerced by Collura saying Lancaster was a company lawyer, I find the argument unpersuasive. Sackin simply made a mistake, conflating Lancaster's presence with Collura's stated purpose that she was assisting the company lawyers. Lancaster was too well known to pass himself off as a company lawyer. Even if Sackin did not know him, neither Lancaster nor Collura would have attempted such a thing. There was no effort to mislead Sackin and therefore no 8(a)(1) implication.

[19] *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

mus against protected conduct—his union stewardship and his willingness to testify in the Labor Commissioner hearing. Respondent characterizes the eleven violations as an anomaly, which this no doubt was. Sackin's tardiness resulted in a chain of events that Respondent unconvincingly claims was an egregious, blatant disregard for the rules. Even so, Sackin was simply trying to be a good employee and get to his table on time; in doing so, he broke some minor rules. In that sense, some admonishment or counseling was appropriate, perhaps at the cost of the attendance points he should have incurred. Certainly, none of these infractions seriously impacted the health or safety of any patrons, nor did it jeopardize the integrity or security of the casino. And, there is no showing that customers even noticed, much less that the Wynn's decorum concerns were affected. Yet, Respondent chose to suspend Sackin and skip lesser disciplines, jumping him from admonishment to a second, last, and final written warning, the last step short of firing him. Plus, on top of the written warning and suspension he was verbally warned that his conduct would now be under severe scrutiny.

Moreover, the effort undertaken by Respondent to stitch the video surveillance together to document Sackin's numerous violations while at the same time adding these minor violations together in a geometric fashion to justify its action seems extraordinary, given that his underlying purpose was simply to get to work on time. Respondent's justification is extremely weak at best. Until the day he ran late, Sackin was a seasoned employee who did not have any outstanding discipline on his record. Yet, Respondent dug as hard as it could to trump up as many violations as possible in order to subject Sackin to discipline. Indeed, in its zeal, Respondent failed to fully investigate the numerous violations, specifically by failing to interview or get a statement from the employee Sackin allegedly "pushed" on his way to his table. The Wynn's response simply does not add up.

Although there is no evidence that Respondent made explicit remarks expressing union animus, it seems to me that Sackin's tardiness made him a target of opportunity. It is therefore appropriate to look to the surrounding circumstances in the absence of direct evidence of union animus. Both its departure from its policy of progressive discipline and its abrupt, high level of punishment,[20] the second, last, and final warning, resounds as a warning shot. Respondent's over weighted conclusion that Sackin violated eleven policies in running a few minutes late; its statement that it could have terminated him but would instead give to him the lesser punishment of time-served suspension; at the same time warning him to remain under the radar; and telling him that he had been allowed to return to work "by the hair of [his] chin," all taken together are evidence of an antisteward motive.[21] The message Respondent was sending was clearly an effort to neuter one of the Union's stewards and to let him and his fellow employees know that he was now operating hobbled; that he was unable to stand up for employees as strongly as he might otherwise have.

Based on the totality of the surrounding circumstances, it is evident that Respondent disciplined Sackin to such an extreme degree because of its animus arising from his two instances of protected conduct, his stewardship and his willingness to testify on behalf of his fellow employees at the Labor Commissioner hearing. Respondent's contention that it harbors no such animus is rejected. The General Counsel has met its initial *Wright Line* burden in establishing a prima facie case. Likewise, Respondent has failed to rebut that case or present a valid justification for the level of discipline applied. Certainly it has not persuaded me that it would have taken the same action if Sackin had not been a steward or if he had not been supportive of the employee cause before the Labor Commissioner. I therefore find that Sackin was disciplined in violation of 8(a)(3) and (1) of the Act.

C. Termination of Larson

The General Counsel asserts that Larson was disciplined and terminated for engaging in union and protected concerted activities and that Respondent's action violated Section 8(a)(3) and (1). The *Wright Line* burden-shifting analysis set forth above is also applicable to Larson's termination. Therefore, the General Counsel must have established that Larson was engaged in protected conduct, that Respondent knew about her protected conduct and that union animus was a motivating factor in Respondent's decision to terminate Larson.

The record is rich with evidence of Larson's protected conduct. Larson was widely known to be a union supporter and early on was identified as a union in-house organizer. Until she was fired, she served as a union steward, being particularly active and visible as a *Weingarten* representative. She has been outspoken on numerous occasions about her dissatisfaction with the new toke policy, even publicly challenging company president Andrew Pascal over the change. Respondent also knew Larson had actively solicited contributions for the fund that provided legal representation for the dealers before the Nevada Labor Commissioner and that she had provided assistance to counsel during the hearing. Clearly, Respondent was well aware of Larson's union and protected concerted activity. That knowledge is so plain that Respondent does not contest that component of the prima facie case.

As with Sackin, the only element of the *Wright Line* test in dispute is whether there is evidence of Respondent's animus. Aside from the animus perceived in Sackin's case, there is no direct evidence of a general animus. Again, however, I observe that a general animus is unnecessary; it is only necessary to find it aimed at a particular employee. Once again, I consider the surrounding circumstances as Respondent decided to discharge Larson.

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[20] *Keller Mfg. Co.*, 237 NLRB 712, 714 (1978) (skipping steps in the progressive discipline policy and more strictly enforcing rules are evidence of animus). Also *Fayette Cotton Mill*, 245 NLRB 428 at 438 (1979); *Joseph Chevrolet*, 343 NLRB 7, 18 (2004).

[21] The Board has long held that harsher treatment for stewards, even if the conduct for which they are being disciplined is not protected, is nonetheless a violation of the Act. See *United Aircraft*, 188 NLRB 633 (1971); *Precision Castings Co.*, 233 NLRB 183 (1977); *Radisson Muehlebach Hotel*, 273 NLRB 1464 (1985); and *Port Plastics*, 279 NLRB 362 (1986).

In 2007, during the ongoing litigation over the new toke policy, the Union began taking steps toward representing Respondent's dealers. Sometime in May, the Union won the representation election. As an active union organizer, Larson was outspoken in her opinions and because of her visibility she appeared on Respondent's radar.

As described above, 4 days after the first session of the Labor Commissioner hearing concluded, Larson began receiving enhanced discipline. Despite its being a minor infraction, correcting her own mistakes, Larson was issued a First Written, a departure from its normal procedure concerning ordinary dealer mistakes. That is not a part of the complaint here, but nevertheless seems to have been part of Respondent's effort to hamstring union stewards. Only 2 months later, on September 6, Respondent's effort bore fruit, though based on some very questionable evidence. Significantly, it took extraordinary measures to justify and corroborate the reasons for the discipline. On that day, Larson was accused of two different episodes of misconduct even though she had no idea she had committed any rule violation whatsoever.

The issue involving the Mehta party was clearly overblown. Larson was doing what she had been instructed to do, trying to get along with the players. She was being playful and amusing, even going along with their complaints about smoking. All agreed that smoking was bad; she simply pointed out that it was bad in another sense—workers were heavily exposed to second-hand smoke. Her remark was no reflection upon Respondent; it was a matter common to all businesses in Nevada—a public policy issue which impacted employees. Indeed, her light-hearted comment might be regarded as protected activity—an appeal to out-of-state customers to complain to the Nevada authorities that smoking was damaging to the health of Nevada workers. Even her remark that she was just working to pay her mortgage must be considered as wry, dry humor. After all, paying the mortgage is the goal of much of America. It was far from being a complaint about her job. Aside from that, however, whatever negativity the Mehta party may have perceived, there is no reason why Respondent should have taken it as accurate. The party had lost money at her table and appeared to blame her. Neither her replacement dealer nor the dealer at the adjacent table noticed anything remarkable at all. The complaint instead came from Brian Lindaman, the pool area manager that day. Even he did not witness what Larson had supposedly done or said. He only heard grumbling about her—a player declined another player's invitation to join him at Larson's table, saying that she was "downright rude." Lindaman never saw the so-called rudeness himself, so he asked the guests if they would like to fill out a comment form; both declined. Nevertheless, Lindaman then asked the other two dealers on the string what they knew. One had heard a guest remark on Larson's mortgage comment. He later told the Casino Manager, Tyne, of the so-called incident.

Tyne, of course, went to great lengths to document the matter. Indeed, his disproportionate efforts have led me to conclude that Respondent had some sort of special purpose against Larson, very similar to the undertaking against Sackin. Tyne would not be deterred in his quest to obtain statements from Salute and Mehta, even going so far as to track Mehta down at the restaurant where he had reservations for dinner and to offer the Mehta group ten passes to the casino's nightclub in exchange for his statement against Larson. Mehta was astonished by Tyne's doggedness saying it was "aggressive." If Tyne's purpose was to make certain guests were happy with their experience at Respondent, his pursuit of an employee seemed to assure that Mehta's dinner group, at least, was distracted from its enjoyment. Moreover, Salute, who appears to have grumbled more than Mehta, never provided any statement whatsoever. Salute was the one who had deliberately chosen to bet oddly and not follow the standard way of playing blackjack. His play had drawn complaints from the other players who had asked Larson if he was playing conventionally. She responded that he was not. Salute did not care for her answer, even though he must have known he was betting atypically. For that reason did Salute have second thoughts concerning the merits of his grousing about Larson and decline to provide a statement to Tyne? By the time of the instant hearing, Mehta certainly had second thoughts.

The second incident is even less remarkable than the first. Here CSTL Corsaro felt disrespected when Larson disagreed[22] (in the mildest of ways) with his decision not to call for a chip fill, overruling her request. I think she was being perfectly reasonable in asking for the fill; likewise, he was being perfectly reasonable in assessing the situation and deciding a fill was not yet necessary. His alternative request, that she "color up" her chips, to him seemed to have been disregarded as well when she threw a tip into the toke box. In my review of the video, it is clear that she did not do that defiantly, but from habit. Her move was typically automatic, one she made frequently; it was not an expression of noncooperation. The upshot of all this is at least two-fold. First, she has been charged with insubordination. Yet, there was no insubordinate conduct. The insubordination was mostly in Corsaro's mind. He, of course, did not make any decision; he simply told Lindaman that Larson had refused his order to color up her chips.[23] Lindaman had moments before been on her case over the Mehta matter, which by then had been bucked to Tyne. What was unreasonable was the Lindaman-Tyne response to a near-silent, slight difference of opinion between veteran coworkers. Tyne too-readily seized upon it as another justification to get rid of Larson. He undoubtedly knew she was already under a First

[22] Corsaro testified that when he asked Larson to "save" the lower denomination chips, she told him, "I don't feel like it" later saying "I don't have to do anything I don't feel like doing." This version is contradicted by Larson who says she simply said almost under her breath and in a sing-song, playful way, "No-o-o." Based on Larson's generally good-humored personality, I credit her over Corsaro.

[23] Even if she had refused to color up her chips, it is really a minor matter. I do not perceive that behavior to be a firing offense. After all, Corsaro was not, as Respondent has made clear, a supervisor who has the authority to issue such orders. He can request, but he cannot order. An employee's noncompliance with a CSTL's request would draw a supervisor who could issue the order, where a second noncompliance could result in a finding of insubordination. But that would also allow the dealer to explain his or her side of what had happened. A reasonable supervisor might support the dealer, particularly one as experienced as Larson.

Written. From his point of view, it was easy to combine the two matters.

In its defense, Respondent contends that eighteen of the forty-six in house organizers have received no discipline whatsoever and that those numbers reflect the general statistics of all employees, Larson was the most active of the stewards, and a leader in the toke dispute. The level of discipline meted out to her was far greater than warranted. In fact, there is no evidence that Respondent ever actively solicited and pursued guest complaints about an employee to the extent it did in this case. Particularly persuasive is the vigor with which Respondent sought out evidence regarding these two infractions. The harsh treatment of Larson for her relatively minor infractions was out of the ordinary and highly suspect given the surrounding circumstances. Indeed, the evidence that Larson had even committed these infractions is flimsy at best.

Additionally, while not part of this complaint, Respondent denied Larson access to a *Weingarten* representative before writing a statement regarding these two infractions. Even though both Sackin and Larson asserted that they should be able to speak with each other before or during the time Larson wrote her statement, Larson was refused a representative. Finally, only after a great deal of resistance, did Respondent allow Sackin to be present while Larson wrote her statement. However, Respondent insisted that its assistant casino manager, Sorani, be present at all times and that Larson and Sackin remain silent, thereby precluding any conversation between them. As stated above, this is not part of the current complaint, however it does further illustrate Respondent's union animus, for it was rendered in disregard of Larson's *Weingarten* rights.[24] At the very least it is a rejection of a principal employee right. It certainly qualifies as union animus.

Respondent argues that regardless of Larson's protected activity, it still would have discharged her. Respondent points to a number of disciplinary actions against various employees who were rude to customers or to their supervisor. Here, Larson has been accused of rudeness and insubordination; however, the evidence does not show that either actually occurred. Only after tracking down one guest, Mehta, was Respondent able to get any kind of statement regarding Larson's comments about smoking by the pool. Mehta testified that he thought it was suspicious how much effort the Respondent was putting into getting his statement and testified further that he did not think Larson had done anything to warrant termination. As for insubordination, Larson merely exchanged a few hushed words with Corsaro, the severity of which did not warrant the subsequent discipline. Respondent presented a spate of instances of discipline. However, in most of its termination cases, the conduct of the employee was far more egregious or the employee had a history of misconduct. Larson did not have any discipline on her record until after her participation in the Labor Commissioner hearing and the conduct on which Respondent relies to justify her dismissal is simply insufficiently persuasive. Certainly the discipline for similar misconduct cited in footnote 12 was far more lenient than that levied upon Larson. Larson was an experienced dealer and, given the overzealousness in disciplining her for relatively minor infractions, Respondent cannot overcome a pretext analysis. The timing, the clear effort to defang stewards (including denying her access to steward Sackin and issuing the warning to Sackin described, infra), the lesser discipline taken against other employees who committed equal or greater rule violations and the surrounding circumstances all support the conclusion that union and concerted activity animus was the motivating factor in Respondent's decision to discipline and discharge steward Larson. Accordingly, I find Respondent violated Section 8(a)(3) and (1) in disciplining and firing her. Indeed, I reemphasize that Respondent has covertly targeted stewards, first by weakening their tenure and then by inflating any instance of minor misconduct beyond the reasonable.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As Respondent discriminatorily discharged Ronda Larson, it must offer her reinstatement to her previous job, or if it is not available, to a substantially similar job, and make her whole for any loss of earnings and other benefits she may have suffered. Respondent shall take this action without prejudice to her seniority or any other rights or privileges she may have enjoyed.

In addition, as Respondent discriminatorily suspended and warned David Sackin, it shall be ordered to rescind the suspension and warning and to make him whole for any loss of earnings and other benefits he may have suffered.

Backpay for Larson, if any, shall be computed on a quarterly basis from the date of her discharge to the date Respondent makes a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950). Backpay for Sackin shall be based on the length of his unlawful suspension. In both cases daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), shall be added to the net backpay amounts. Furthermore, Respondent shall be required to expunge from its per-

[24] Although not strictly a *Weingarten* case, in *Cook Paint & Varnish*, 258 NLRB 1230 (1981), the Board had occasion to review the facts relating to an employer's demanding that a union steward tell him what a grievant had said to him and to turn over his notes about the conversation. The Board found the conduct to violate Sec. 8(a)(1), saying, "Clearly, the scope of Respondent's questioning exceeded the permissible bounds outlined by the court and impinged upon protected union activity." For while questions posed by Nulton may be termed "factual inquiries," the very facts sought were the substance of conversations between an employee and his steward, as well as the notes kept by the steward, in the course of fulfilling his representational functions. Such consultation between an employee potentially subject to discipline and his union steward constitutes protected activity in one of its purest forms. To allow Respondent here to compel the disclosure of this type of information under threat of discipline manifestly restrains employees in their willingness to candidly discuss matters with their chosen, statutory representatives." Id. 1232. Thus Respondent's placing a high-ranking official in the room as well as silencing Sackin clearly interfered with Larson and Sackin's ability to discuss the matter in confidence. It was a denial of union representation, as *Cook* says, in its purest form.

sonnel files any reference to their illegal discharge or suspension. *Sterling Sugars*, 261 NLRB 472 (1982).

The affirmative action shall also require Respondent to post a notice to employees announcing the remedial steps it will undertake. In addition to the physical posting of paper notices, the notices shall be distributed electronically, by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. See *J. Picini Flooring*, 356 NLRB 11, 13 (2010).

Based on the above findings of fact, I hereby make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Transportation Workers Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On August 21, 2009, Respondent suspended its employee David Sackin because of his activities as a union steward on behalf of the Union and because he intended to give testimony on behalf of his fellow employees in a hearing before the State of Nevada Labor Commissioner; in doing so it violated Section 8(a)(3) and (1) of the Act.

4. On September 6, 2009, Respondent suspended its employee Ronda Larson and thereafter discharged her because of her activities as a union steward and because she assisted her fellow employees in their complaint to the Nevada State Labor Commissioner as well as assisting the employees in obtaining counsel for that proceeding and assisting counsel during the hearing in that matter. It therefore violated Section 8(a)(3) and (1) of the Act.

5. The General Counsel has failed to prove any other violation of the Act.

[Recommended Order omitted from publication.]